IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

COMMONWEALTH OF VIRGINIA, *ex rel.* INTEGRA REC LLC Plaintiff, v. COUNTRYWIDE SECURITIES CORPORATION, *et al.*, Defendants.	)	Civil No. 3:14cv706 (MHL)

ORDER

The parties come before the Court by Order (ECF No. 86) for the purposes of settlement. On June 9, 2015, the undersigned met with the Commonwealth and the defendants that have been removed to this Court ("federal defendants") for the purpose of facilitating settlement. On June 10, 2015, the undersigned met with the defendants not participating in the removed portion of this action ("state defendants"), but nonetheless wished to participate in settlement discussions.[1] As a result of the discussions, it became apparent that both sides needed to more fully develop the

[1] In the parallel state court action, Deutsche Bank Securities Inc. ("DBSI") appeared specially for the limited purpose of objecting to personal jurisdiction and moving to dismiss the Complaint. In reliance on the Commonwealth's representation that the Commonwealth would not argue that by participating in the ongoing mediation in the instant action DBSI had waived its jurisdictional objection, DBSI accepted the Court's invitation to participate in the mediation. The Commonwealth has renewed and expanded its representation to encompass DBSI's continued participation in the mediation, including without limitation providing information to the Commonwealth and/or the Court, and seeking information from the Commonwealth in compliance with this Order. Accordingly, the Court finds that DBSI's participation in the instant mediation shall not be deemed to be engaging in conduct related "to adjudicating the merits of the case" within the contemplation of Virginia Code § 8.01-277.1, and that, accordingly, such participation will not waive or compromise in any respect DBSI's objection to personal jurisdiction.

underlying facts pertaining to the Commonwealth's claims based on common law fraud as applied to the non-*Luther* securities at issue.[2] Accordingly, with the agreement of all parties, the Court ORDERS the following to facilitate settlement.

The Commonwealth's Initial Production

Not later than July 30, 2015, the Commonwealth shall provide each defendant with a letter brief, along with a copy to the Court, that contains the following information pertaining to the certificates for the residential mortgage-backed securities ("RMBS") pertaining to that institution:[3]

- An opening section with an overview that details the elements of each cause of action and the legal support for the Commonwealth's position on any damages that it may seek if it prevails on the cause of action;
- An identification of comparable settlements in other similar cases that could be used as a model in this case, including the settlement rate;
- For each RMBS at issue for that particular institution, a detailed, factual narrative that sets forth:
    - the original offering date of the certificate;
    - the original underwriter(s) of the certificate;

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[2] Although the Court will focus only on the Commonwealth's common fraud claims pertaining to non-*Luther* securities, the Commonwealth has not waived its ability to seek recovery for the *Luther* securities at issue or for redress under the Virginia Fraud Against Taxpayers Act. Instead, the Court simply believes that the most productive approach to settlement involves focusing solely on the merits of the common law fraud claims.

[3] All of the letter briefs ordered shall be treated as follow-up settlement memoranda that are provided to opposing counsel and the undersigned's chambers via e-mail and not electronically filed. The Commonwealth shall provide each defendant with a brief individually directed to the certificates at issue for that institution. The Commonwealth shall not provide copies to the other defendants; however, any defendant may elect to share the Commonwealth's brief regarding its institution with any co-defendant. If a defendant elects to share the Commonwealth's brief regarding its institution with a co-defendant, the electing defendant must give notice of doing so to both the Commonwealth and the undersigned's chambers. Likewise, each defendant must provide its response only to the Commonwealth and the undersigned's chambers; however, a defendant may share its brief with any co-defendant, while giving notice of doing so to both the Commonwealth and the undersigned's chambers. Any reply submitted by the Commonwealth shall follow these same rules.

- the date of purchase of the certificate by the Virginia Retirement System ("VRS");
- the entity or individual(s) (including any broker-dealer) that sold the certificate to the VRS;
- the aggregate purchase price for the certificate paid by the VRS;
- the purchase amount stated in terms of original par value for the certificate;
- a transactional history for the certificate from its original sale until its purchase by the VRS;
- if the VRS purchased the certificate on the secondary market and not directly from the defendant, an explanation as to the liability of the defendant with regard to the downstream purchase by the VRS and whether any intervening actions by intermediate buyers/sellers impact the liability analysis, particularly as to reliance by the VRS on any alleged misstatements by the defendant;
- for any downstream purchases by the VRS, a summary of any communications that the VRS had with the original underwriter before the purchase of the certificate by the VRS;
- the specific facts underlying the alleged fraudulent statement(s) pertaining to the certificate and the evidentiary support to establish the fraud at trial;
- an identification of the individuals who purchased the certificate for the VRS and their roles in the purchase;
- a description of any analysis or due diligence that the VRS or its outside advisors performed before the purchase of the certificate by the VRS, including any review/analysis of the offering documents to include the prospectus supplement;
- an identification of any downgrades or public statements regarding a diminution of the value of the certificate before its purchase by the VRS;
- an explanation with specific facts regarding the alleged reliance upon the alleged fraudulent statement by the VRS to include those who reviewed the offering documents (including the prospectus supplement) and the extent of their review;
- the date of sale along with sale price and principal balance purchased of the certificate if sold by the VRS, along with an identification of the actual seller (*e.g.*, broker-dealer) who sold the certificate on behalf of the VRS;
- any disclosures made by the VRS about the value of the certificate to any purchasers before or at the time of the sale;
- if the VRS continues to retain the certificate, the current value recorded of the certificate in the VRS's internal financial statements;

- the amount of principal payments received by the VRS during the period that the certificate was held by the VRS;
- a calculation and explanation (including method of calculation, specific dates used for the calculations and the impact of any non-fraud factors) of damages pertaining to the certificate to include any actual losses, any lost interest and any lost profits by the VRS;
- to the extent that the Commonwealth relies on any lost opportunity to purchase alternative investments that were not considered at the time of the VRS's purchase of the certificate, identify the alternative investments, their cost at the time and their alleged rate of return;
- the date and amount of any write-down or write-up by the VRS pertaining to the certificate as reflected in any of the VRS's financial statements;
- the dollar amount of any income recorded pertaining to the certificate due to its increase in value after the date of purchase; and,
- if multiple underwriters are involved, an explanation regarding the allocation of the damages amongst all institutions involved.

In addition to this information, each brief shall contain a certification from the Commonwealth that the leadership of the VRS has reviewed and agrees with the Commonwealth's position, including the damages involving actual losses and lost profits. This information shall be provided security-by-security and in narrative form for each institution.

Defendant's Response

Not later than September 16, 2015, each defendant shall provide the Commonwealth with a letter brief, along with a copy to the Court, that contains the following information pertaining to the certificates for the RMBS pertaining to that defendant:

- An opening section with an overview that details the elements of each cause of action and the legal support for any non-procedural defense that the defendant intends to offer and for the defendant's position on any damages that the Commonwealth intends to seek if it prevails on the cause of action;[4]

[4] Because the Court has already addressed the statute of limitations issues raised by the defendants, there is no need for further discussion of these issues. However, by proceeding in this

- An identification of comparable settlements in other similar cases that could be used as a model in this case, including the settlement rate, along with a response to the Commonwealth's cited examples;
- For each RMBS at issue for that particular institution, a detailed, factual narrative that sets forth:
    - a factual response to the Commonwealth's submission as to each of the above points, including identifying any dispute as to the Commonwealth's position. If there is a factual dispute on any point, the defendant must offer its own contrary, factual recitation and not merely deny the Commonwealth's position;
    - a detailed description of any internal or third-party due diligence associated with the certificate before its sale;
    - if the loan tapes or similar information exists for the certificate, provide the information as it relates to any factual challenge to the Commonwealth's position to include data regarding owner-occupancy, second liens and loan-to-value;
    - an identification of any automated valuation model used during due diligence activities and any automated valuation associated with the certificate before its sale; and,
    - the factual basis for any affirmative, non-procedural defense that will be offered at trial.

This information shall be provided security-by-security and in narrative form for each institution.

Along with their response to the Commonwealth's brief, **each defendant must provide the Commonwealth with a serious, non-posturing offer to resolve the pending lawsuits.**

The Commonwealth's Reply

Not later than October 6, 2015, the Commonwealth may submit any reply to any defense submission as it believes appropriate. Any reply must also be in narrative form.

The Court's Next Meeting with the Commonwealth

The Court will conduct a follow-up settlement conference meeting with only the Commonwealth on Monday, November 2, 2015, at 9:30 a.m. At that time, the Court will conduct a

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fashion, the defendants have not waived the ability to assert defenses based on the statute of limitations.

security-by-security review with the Commonwealth and provide the Court's evaluation of the Commonwealth's case, along with the Court's proposed settlement figures. The Court expects that this meeting will take the entire day. Thereafter, the Commonwealth's representatives shall meet with the Attorney General of Virginia, the leadership of the VRS and the appropriate officials within the Office of the Governor of Virginia and review the submissions in this case by all parties and the Court's evaluation of the case. **The Commonwealth must then provide each defendant with a serious, non-posturing counter-offer to resolve the pending lawsuits not later than 4:00 p.m. on Thursday, November 5, 2015.** A copy of each offer shall also be emailed to the undersigned's chambers at that time.

Follow-up Settlement Conference

On Monday, November 9, 2015, at 9:30 a.m., the Court will meet with the Commonwealth and the federal defendants for a follow-up settlement conference. The Court will begin with individual meetings with the federal defendants and ask for a response to the Commonwealth's counter-offer. The Court expects that each defendant will have reviewed the Commonwealth's counter-offer with the appropriate business officers before the Monday settlement conference. Thereafter, the Court will meet with the Commonwealth and then continue forward with an exchange of positions.

On Tuesday, November 10, 2015, at 9:30 a.m., the Court will meet with the Commonwealth and the state defendants, and then follow the same process as described for the previous day. The Court holds the same expectations for the representatives of the state defendants regarding the review of the Commonwealth's counter-offer before the follow-up settlement conference.

For both days, the Court will continue to require that the parties each have a representative physically present with full authority to settle this action under the guidelines previously provided.[5]

Stay of Proceedings

To allow the settlement process to move forward in a meaningful manner, all parties have agreed to a full stay of the proceedings in both this Court and the state court. In staying these cases, however, the Court reminds the parties in the strongest possible terms of the importance of a serious and detailed exchange of information. To that end, the Court will not impose a page limit on any submission.

Moreover, to underscore the importance of a serious effort by all parties, Judge Lauck has instructed the undersigned to report to her after the filing of each submission as to whether the parties have engaged in a serious effort. Should any submission lack the specificity, thoroughness and consideration required to facilitate meaningful settlement discussions, the undersigned will be prepared to report such to Judge Lauck, and recommend that the stay of the federal case be immediately lifted.

The Clerk is directed to send a copy of this Order to all counsel of record for all parties and to the Honorable M. Hannah Lauck, United States District Court Judge.

It is so ORDERED.

/s/
David J. Novak
United States Magistrate Judge

Richmond, Virginia
Date: June 15, 2015

[5] The term "full authority" means the ability of a representative physically present for the Commonwealth to resolve the case up to $250,000 and the ability of a representative available telephonically to resolve the case over that amount. The term "full authority" means the ability of a representative physically present for any defendant to resolve the case up to $1,000,000.